

State of New Hampshire
Supreme Court

NO. 2006-0201

2006 TERM

JUNE SESSION

State of New Hampshire

v.

Lawrence Sleeper

RULE 7 APPEAL OF FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT LAWRENCE SLEEPER

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES	<i>ii</i>
QUESTIONS PRESENTED	<i>1</i>
STATEMENT OF FACTS AND STATEMENT OF THE CASE	<i>2</i>
SUMMARY OF ARGUMENT	<i>3</i>
ARGUMENT	<i>4</i>
I. Mr. Sleeper Has a Fundamental Constitutional Right to Liberty	<i>4</i>
II. Mr. Sleeper Is Eligible for Bail Because His Situation Does Not Fit into Any Exception to the Bail Statute	<i>5</i>
III. “After Conviction” Does Not Extend Indefinitely	<i>8</i>
IV. “After Conviction” Ends When Conviction Ends	<i>10</i>
A. “After Conviction” Means Upon Service of the Sentence for the Conviction	<i>10</i>
B. “After Conviction” Means Upon the Undoing of the Conviction	<i>11</i>
V. Standard Bail Considerations Apply	<i>12</i>
CONCLUSION	<i>13</i>
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION	<i>13</i>
APPENDIX	<i>following 14</i>

TABLE OF AUTHORITIES

FEDERAL CASES

<i>United States v. Daugherty</i> , 269 U.S. 360 (1926)	10
--	----

NEW HAMPSHIRE CASES

<i>Debonis v. Warden</i> , __ N.H. __ (decided June 9, 2006)	6
<i>Fischer v. Governor</i> , 145 N.H. 28 (2000)	9
<i>John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.</i> , 147 N.H. 352 (2001)	8
<i>Larose v. Superintendent, Hillsborough County Correction Admin.</i> , 142 N.H. 364 (1997)	4, 8
<i>Petition of Hamel</i> , 137 N.H. 488 (1993)	4
<i>Stapleford v. Perrin</i> , 122 N.H. 1083 (1982)	10
<i>State v. Callahan</i> , 126 N.H. 161 (1985)	10
<i>State v. Cere</i> , 125 N.H. 421 (1984)	11
<i>State v. Clark</i> , 151 N.H. 56 (2004)	6, 7
<i>State v. Collins</i> , 133 N.H. 609 (1990)	11
<i>State v. Gubitosi</i> , __ N.H. __, 888 A.2d 1262 (decided Dec. 30, 2005)	8
<i>State v. Marini</i> , 117 N.H. 71 (1977)	5

<i>State v. Maxfield</i> , 117 N.H. 1019 (1977)	11
<i>State v. McCoy</i> , 14 N.H. 364 (1843)	11
<i>State v. Michael B.</i> , 124 N.H. 590 (1984)	10
<i>State v. Seeley</i> , 116 N.H. 57 (1976)	5
<i>State v. Sleeper</i> , 150 N.H. 725 (2004)	2
<i>State v. Soucy</i> , 139 N.H. 349 (1995)	11

DOCKETED CASES

<i>Lawrence Sleeper v. Bruce Cattell, Warden</i> , N.H. Sup.Ct. No. 2006-0150	2
--	---

CONSTITUTIONS

U.S. Const., amd. 14	4
N.H. Const., pt. I arts. 2 & 15	4

NEW HAMPSHIRE STATUTES

RSA 159:3, I(b) 9

RSA 597:1 5

RSA 597:1-a 2, 5, 7

RSA 597:1-a, I 5, 6, 8

RSA 597:1-a, II 5

RSA 597:1-a, III 5

RSA 597:1-a, IV 5

RSA 597:1-c 5, 7

RSA 597:2 6, 7

RSA 597:2, I 7

RSA 597:2, III 7

RSA 607-A:3 9

RSA 651-B 9

RSA 651-B:6 9

RSA 651-D:2, I 9

QUESTION PRESENTED

- I. Did the court err in automatically denying Mr. Sleeper bail after his petition for writ of *habeas corpus* was granted, when he is not awaiting sentencing nor appeal?

Preserved: 2/16/06 Trn. at 9-10

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In 2002 Lawrence Sleeper was convicted of two counts of felonious sexual assault, and four pattern counts of aggravated felonious sexual assault. The conviction was appealed and affirmed. *State v. Sleeper*, 150 N.H. 725 (2004). Later, Mr. Sleeper filed a petition for writ of *habeas corpus*, which was granted, *Lawrence Sleeper v. Bruce Cattell, Warden, Merr.Cnty. Super.Ct. No. 05-E-453* (Jan. 27, 2006), and which the State has appealed. *Lawrence Sleeper v. Bruce Cattell, Warden*, N.H. Sup.Ct. No. 2006-0150. In granting the *habeas*, the court (Arthur D. Brennan, J.) ordered that Mr. Sleeper was “entitled to a new trial,” and ordered “a bail hearing to be scheduled.” DECREE ON PETITION FOR WRIT OF HABEAS CORPUS, *appx.* at 15.

The bail hearing was held on February 16, 2006, after which the Merrimack County Superior Court (*Edward Fitzgerald, III, J.*) ordered Mr. Sleeper held without bail, writing:

This Court sees this as analogous to a defendant taking an appeal following his convictions for aggravated felonious sexual assault. The legislature has directed that a defendant in those circumstances be held without bail pending appeal. Defendant’s request for bail is, therefore, denied and he is to be held without bail pending the appeal.

ORDER, *appx.* at 21.

Although no citation was provided, it is apparent that the court was referring to RSA 597:1-a, which denies bail to defendant/appellants convicted of, among other crimes, felonious sexual assault. Consequently Mr. Sleeper was remanded to the Merrimack County House of Corrections awaiting the outcome of the State’s *habeas corpus* appeal.

Because that appeal was (and is still) pending, and Mr. Sleeper believed the bail statute was erroneously applied, he cross-appealed. By order dated March 24, 2006, this Court divided the *habeas corpus* appeal and this bail appeal into two separate dockets, and later granted Mr. Sleeper’s request to expedite this proceeding.

SUMMARY OF ARGUMENT

Mr. Sleeper points out that he has a constitutional right to liberty that can be taken only by due process.

He first argues that the language of the statute barring bail to sexual assault appellants does not apply because is he not a sexual assault appellant.

Mr. Sleeper then argues that even if the statute did apply, its words “after conviction” do not extend indefinitely, but end when the conviction ends, which is either upon service of the sentence or upon the undoing of the conviction. He points out that because he was granted a new trial, his conviction has been undone, and he should thus be considered for bail as any person charged with a crime.

ARGUMENT

I. Mr. Sleeper Has a Fundamental Constitutional Right to Liberty

Citizens have a right to liberty, which cannot be taken except by due process. U.S. CONST., amd. 14; N.H. CONST., pt. I arts. 2 & 15. New Hampshire's bail statutes comply with those rights. *See e.g., Larose v. Superintendent, Hillsborough County Correction Admin.*, 142 N.H. 364 (1997) (video bail hearings not violate due process); *Petition of Hamel*, 137 N.H. 488 (1993) (statute denying post conviction bail to those convicted of felonious sexual assault not violate equal protection).

II. Mr. Sleeper Is Eligible for Bail Because His Situation Does Not Fit into Any Exception to the Bail Statute

The general provisions of the “Bail and Recognizances” statute, RSA chapter 597 is: “Except as provided in *RSA 597:1-a*, 597:1-c, or 597:1-d, all persons arrested for an offense shall be eligible to be released pending judicial proceedings upon compliance with the provisions of this chapter.” RSA 597:1 (emphasis added). The statute demonstrates New Hampshire’s policy to “strongly endorse granting bail pending appeal.” *State v. Marini*, 117 N.H. 71, 73 (1977) (but presumption somewhat diluted by subsequent amendment); *State v. Seeley*, 116 N.H. 57, 58 (1976) (purpose of statute “is to encourage the release on bail of defendants pending appeal”).

The exception alluded to by the court as the reason for denying bail to Mr. Sleeper is in RSA 597:1-a. For defendants who are awaiting sentencing or whose appeal is pending, it sets up a sliding scale of bail-ability. It provides that misdemeanor convicts “shall, before the conclusion of the appellate proceeding, be released” on specified conditions. RSA 597:1-a, IV. The presumption is opposite for felons awaiting sentencing and for felons who have already been sentenced and have appealed: they “shall . . . be detained,” unless specified conditions are met. RSA 597:1-a, III & II. The bar is highest for those convicted of offenses punishable by death or life without parole, and for felony sexual assault convicts – such defendants “shall not be allowed bail.” RSA 597:1-a, I.

Mr. Sleeper fits into none of the exceptions. He is neither a misdemeanant, nor a felon awaiting sentencing. He is not a felonious sexual assault convict, nor does he have a conviction on appeal. Mr. Sleeper was granted a writ of *habeas corpus* and a new trial based on the finding that his previous trial was legally infirm. He is in the same position as the day the grand jury

indicted him – he has been charged with crimes, but he is presumed innocent.

It is no surprise that Mr. Sleeper does not fit into any of the exceptions. The exception statute is entitled “Release or Detention of a Defendant Pending Sentence or Appeal.” The title makes clear its purpose. *See State v. Clark*, 151 N.H. 56, 58 (2004) (title of these statutes important to their construction). As Mr. Sleeper is neither pending sentence nor pending appeal, the exception statutes was not intended for him.

The lower court found his situation “analogous to a defendant taking an appeal following his convictions for aggravated felonious sexual assault.” While analogies are certainly a part of legal reasoning, statutes only cover the subjects explicit by their terms, and words not in the statute cannot be added. *Debonis v. Warden*, ___ N.H. ___ (decided June 9, 2006) (“We will neither consider what the legislature might have said nor add words that it did not see fit to include.”) (quoting *State v. Yates*, 152 N.H. 245, 255 (2005)).

The bail exception referred to by the court provides:

After conviction for an offense punishable by death or, by a term of life imprisonment without possibility of parole, or for aggravated felonious sexual assault or felonious sexual assault, a defendant shall not be allowed bail.

RSA 597:1-a, I.

The exception does not contain the words “after conviction or after a conviction has been reversed, vacated, set aside, or *habeas corpus*-ed . . . a defendant shall not be allowed bail.” Because the legislature did not add those words, and a court cannot, the only conclusion is that the statute does not address Mr. Sleeper’s situation.

The statute that *does* address it is RSA 597:2, entitled “Release of a Defendant Pending Trial.” It provides that “[u]pon the appearance before the court or justice of a person charged

with an offense, the court or justice shall issue an order that, pending arraignment or trial, the person be . . . [r]eleased on his personal recognizance or upon execution of an unsecured appearance bond, . . . [r]eleased on a condition or combination of conditions” that might include “an agreement to forfeit . . . property,” furnishing “bail for his appearance . . . with sufficient sureties or by deposit of money, or “any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of the person or of any other person or the community.” RSA 597:2, I & III.

Although those charged with an “offense punishable by death or murder in the first degree” may not be allowed bail, RSA 597:1-c, there is no provision preventing bail for those charged with sexual assaults, and no provision preventing bail for those whose *habeas corpus* petitions have been granted.

In *State v. Clark*, 151 N.H. 56, 58 (2004), this Court construed this same pair of statutes. In *Clark* the trial court imposed bail after the defendant had received a deferred sentence. This Court noted that neither RSA 597:2 – “Release of a Defendant Pending Trial” – nor RSA 597:1-a – “Release or Detention of a Defendant Pending Sentence or Appeal” – conferred authority to impose bail on a person who was no longer either awaiting trial nor “awaiting imposition or execution of [a] sentence.” *Clark* makes clear the importance of statutory authority for the imposition of bail.

As with *Clark’s* deferred sentence, because the exception relied upon by the court to deny bail to Mr. Sleeper by its terms does not cover his situation, it does not apply. Rather Mr. Sleeper is eligible for bail on the same terms and upon the same considerations as any recently-indicted defendant.

III. “After Conviction” Does Not Extend Indefinitely

In order to apply the exception to Mr. Sleeper’s situation, the words “after conviction” must be strained beyond their plain meaning.

As noted, the felony sexual assault bail exception provides:

After conviction for an offense punishable by death or, by a term of life imprisonment without possibility of parole, or for aggravated felonious sexual assault or felonious sexual assault, a defendant shall not be allowed bail.

RSA 597:1-a, I (emphasis added). This Court construes bail statutes with regard to the plain meaning of their language. *State v. Gubitosi*, __ N.H. __, 888 A.2d 1262 (decided Dec. 30, 2005); *Larose v. Superintendent*, 142 N.H. at 364.

The time that “after conviction” begins is undoubtedly the moment the word “guilty” leaves the mouth of the judge or foreperson. What is not clear, however, is when “after conviction” ends.

If the language is given the interpretation the lower court did here, “after conviction” extends indefinitely. Thus if a person committed one of the acts listed in the statute, serves his time, and then many years later is charged with another crime, however minor, because it is “after conviction” for the listed crime, that person is ineligible for bail. Similarly, if a person committed one of the acts listed in the statute, but his conviction is reversed (or vacated, or pardoned) and then many years later is charged with a minor crime, because it is “after conviction” for the listed crime, that person is also ineligible for bail. In effect, such a construction means that a person, once convicted, would be permanently denied access to the bail statute. *See John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352, 358 (2001) (legislature presumed to not create absurd results).

New Hampshire law does provide for the permanent impairment of some rights as a result of being a convict. For instance, the legislature has plainly stated that a felon cannot own guns. RSA 159:3, I(b) (crime for person to possess firearm or other weapon if he “[h]as been convicted in either a state or federal court in this or any other state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States of . . . [a] felony”).

But the historical legacy of civil death upon being convicted of a felony, *see Fischer v. Governor*, 145 N.H. 28, 33 (2000), has been abrogated by statute, which makes clear that a felon “retains all of his rights,” RSA 607-A:3, including the right to liberty without due process and the right to bail.

The legislature is plainly able to provide for the duration of consequences for a conviction of sexual assault, and if it intended the “after conviction” language to extend indefinitely, it would have said so. For instance, RSA 651-B creates a sexual offender registry, and RSA 651-B:6 specifies how long a person convicted of a sexual assault must remain registered – for ten years or for life, depending upon the nature of the crime. Likewise, in other statutes using the same language, the legislature has been plainly able to specify whether “after conviction” runs indefinitely. *See* RSA 651-D:2, I (“A person in custody pursuant to the judgment of the court may, *at any time after conviction* or adjudication as a delinquent, petition the court for forensic DNA testing of any biological material.”) (emphasis added).

Finally, the legislative history of the bail statute sheds little light, but contains nothing to suggest the legislature intended that one convicted of a felony sexual assault was to become permanently ineligible for bail.

IV. “After Conviction” Ends When Conviction Ends

If “after conviction” does not mean indefinite ineligibility for bail, the remaining question is when “after conviction” ends. *State v. Callahan*, 126 N.H. 161 (1985) (court construed after conviction to mean upon restoration of license, as specified in statute). Given the statute as a whole, it appears that “after conviction” ends when the conviction is disposed in some way, whether by service of the sentence or by undoing of the conviction.

A. “After Conviction” Means Upon Service of the Sentence for the Conviction

Other than statutory provisions specifying consequences lasting longer than the sentence (*i.e.*, possession of a gun, listing on the sex offender registry), when a person completes the service of a sentence, there can be no further consequences to having been convicted.

It is a fundamental rule that “at the conclusion of the sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been exacted by the court as well as the extent to which the court retained discretion to impose punishment at a later date and under what conditions the sentence may be modified.”

State v. Michael B., 124 N.H. 590, 592-93 (1984) (quoting *Stapleford v. Perrin*, 122 N.H. 1083, 1087 (1982)); *United States v. Daugherty*, 269 U.S. 360, 363 (1926) (“[s]entences in criminal cases should reveal with fair certainty the intent of the court”).

No statute specifies that ineligibility for bail runs longer than the conviction, thereby making a person who has completed his sentence subsequently eligible. Accordingly, when “after conviction” ends must at the least mean after service of the sentence for the conviction.

Mr. Sleeper is no longer serving his sentence for any conviction. Thus “after conviction” for him has already occurred.

B. “After Conviction” Means Upon the Undoing of the Conviction

If a conviction is reversed, vacated, annulled, expunged, in some way set aside, or pardoned, the conviction no longer exists. *See, State v. Soucy*, 139 N.H. 349, 353 (1995) (conviction “vacated” results in remand with option to re-try indictment); *State v. Collins*, 133 N.H. 609 (1990) (re-trial after conviction set aside upon finding in *habeas corpus* proceeding that due process rights abridged); *State v. Cere*, 125 N.H. 421 (1984) (conviction set aside for juror misconduct); *State v. Maxfield*, 117 N.H. 1019 (1977) (concession that defendant cannot be found guilty results in remand for entry of finding of not guilty); *State v. McCoy*, 14 N.H. 364 (1843) (conviction “reversed” results in declaration that proceedings below were in error). In such case the person is either restored to their pre-indictment status of being a non-convict, or to their post-indictment status of being an indicted defendant awaiting re-trial. *Soucy*, 139 N.H. at 353.

There is some discussion in the legislative record indicating “it would be unfair and undue to jail someone whose conviction was subsequently overturned.” *Prohibiting Bail Pending Appeal for Persons Convicted of Certain Offenses: Public Hearing on HB 8 Before House Judiciary Comm.* (Jan. 10, 1985) (statement of Rep. Jones).

It would thus appear that “after conviction” ends when the conviction ends. Mr. Sleeper’s was found to be “entitled to a new trial.” His conviction no longer exists, and for him “after conviction” has therefore already occurred.

V. Standard Bail Considerations Apply

In Mr. Sleeper's case, he was convicted, but the *habeas corpus* court ordered a new trial. He thus has been restored to his post-indictment status, and he is awaiting re-trial. This explains his present residence at the county jail rather than at the prison, and the jail's understanding of his pre-trial status. 2/16/05 *Trn.* at 10.

Accordingly, the court erred in not considering the standard list of factors in setting bail for Mr. Sleeper, and he is thus being held unlawfully.

CONCLUSION

Based on the foregoing, Mr. Sleeper respectfully requests this honorable court to release him forthwith, or in the alternative, to remand with an order that he be considered for bail as any other person charged with a crime.

Respectfully submitted,

Lawrence Sleeper
By his Attorney,

Law Office of Joshua L. Gordon

Dated: June 19, 2006

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Lawrence Sleeper requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on June 19, 2006, copies of the foregoing will be forwarded to Nicholas Court, Esq., Office of the Attorney General.

Dated: June 19, 2006

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX

1. DECREE ON PETITION FOR WRIT OF HABEAS CORPUS (*Brennan, J.*, granting writ) 15

2. ORDER (*Fitzgerald, J.*, regarding bail) 21